IN THE

Supreme Court of the United States

October Term, 1977

No. 77-740

GULF OIL CORPORATION, et al.,

Petitioners,

v.

PAUL J. BOGOSIAN,

Respondent.

GULF OIL CORPORATION, et al.,

Petitioners,

v.

LOUIS J. PARISI,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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OPINIONS BELOW

The opinions below are adequately designated in the petition.

JURISDICTION

The jurisdictional requisites are sufficiently set forth in the petition.

QUESTIONS PRESENTED

The questions involved, in the order in which they were treated by the Court of Appeals, are as follows:

(1) Whether respondents' allegations of a combination in restraint of specified interstate trade and commerce sufficed to state a claim under the pleading standards of Rule 8(a), Fed. R. Civ. P.

(2) Whether purchase of one product conditioned on purchase of another is an illegal tying arrangement for which a purchaser may recover resulting illegal overcharges, given economic power over the tying product and an effect on a not insubstantial amount of interstate commerce.

(3) Whether the Court of Appeals was within its authority in correcting errors of law made by the District Court in the application of Rule 23, Fed. R. Civ. P.

STATUTE AND RULES INVOLVED

The petition sets forth, as the statute and rules involved, Section 1 of the Sherman Act, 15 U. S. C. § 1, and Rules 1, 12, 23 and 56 of the Federal Rules of Civil Procedure (Pet. at 4; Pet. App. 132-38). Petitioners have omitted Rule 8, Fed. R. Civ. P., whose proper interpretation is also involved. Rule 8 is, therefore, set forth at R. App. 1A.[1]

1. R. App. refers to respondents' appendix, which is bound at the back of this brief.

STATEMENT

These are actions brought by two service station lessee-dealers, respondents herein,[2] challenging petitioners' uniform practice of tying leases of improved service station sites to the purchase of gasoline supplied by each dealer's lessor. Plaintiffs allege that defendants have combined unreasonably to restrain interstate trade and commerce in gasoline in violation of Section 1 of the Sherman Act by jointly imposing on all lessee-dealers a number of requirements as conditions of obtaining and renewing a service station lease.[3] These conditions are, *inter alia*, that respondents:

> (i) license the use of the individual lessor's trademarks;
>
> (ii) not purchase gasoline from anyone other than the individual lessor for sale under the lessor's trademark; and
>
> (iii) not sell any other supplier's gasoline at all, whether or not under a licensed trademark (Pet. App. 109).

The result of these conditions is to foreclose plaintiffs from purchasing gasoline from anyone but the respective lessors, and to raise and stabilize the price of gasoline to plaintiffs and, indirectly, the public.[4]

2. The cases have been treated by the trial court as consolidated for purposes of discovery and pre-trial motions (Pet. App. 57 n. 1), and have been treated as consolidated by all parties and by the Court of Appeals below.

The District Court's jurisdiction was invoked under 28 U. S. C. § 1337.

3. Plaintiffs' allegation of combination was based on defendants' parallel conduct in imposing significantly similar lease conditions on all lessee-dealers.

4. In their original and first amended complaints, plaintiffs also alleged a number of other illegal restraints of trade imposed on them by defendants (Pet. App. 117-120). These allegations were withdrawn in a second amended complaint in the interest of narrowing the issues in dispute (Pet. App. 76-79).

Since defendants' service station leasing practices involve issues common to the entire class of petitioners' lessee-dealers, plaintiffs moved to have a class of all such lessee-dealers certified pursuant to Rule 23 of the Federal Rules of Civil Procedure. Plaintiffs sought class certification of two claims: a trademark-based tying claim and a lease-tying claim. The trademark claim was grounded on defendants' admitted common lease clauses requiring sale only of petitioners' gasoline under their trademarks, notwithstanding the alleged fungibility of the gasoline (Pet. App. 34, 78). The lease tying claim was based on a number of other common conditions in defendants' leases, including short lease terms, leasehold alteration prohibitions, and minimum gasoline purchase requirements (Pet. App. 32). These conditions deprived each service station dealer of freedom to sell gasoline supplied by anyone other than its lessor (including under other trademarks) (Pet. App. 32).

The District Court recognized that defendants' so-called "trademark protection" clauses were the "primary basis" of plaintiffs' action, and that the trademark-tying claim based on these clauses presented a common question that, by itself, "might be appropriate" for class treatment (Pet. App. 93-94). However, with respect to the lease-tying claim, the District Court held that a tying violation could not be established by proof of the class-wide conditioning effect of the common terms of the leases. It assumed that establishing a tying violation required a showing of "economic coercion" of each lessee-dealer as well (Pet. App. 94-95). Based on its belief that there was a predominating individual question of coercion as to each lessee, the District Court denied class treatment of *all* of plaintiffs' claims (Pet. App. 101-102). Thus, despite defendants' admission that all their leases contain "trademark protection" conditions (Pet. App. 78), the District Court denied class treatment of the trademark tying claim without considering whether that claim should be certified by itself for separate class treatment pursuant to Rule 23(c)(4)(A), Fed. R. Civ. P.

Thereafter, beginning in May of 1974,[5] motions for summary judgment were made by all defendants, petitioners herein, who had had no business dealings with respondents. Respondents moved for discovery pursuant to Rule 56(f), Fed. R. Civ. P., in order to develop evidence of defendants' illegal combination, such evidence being of course in the hands of defendants. However, treating defendants' summary judgment motions as, in effect, motions to dismiss under Rule 12(b)(6), Fed. R. Civ. P.,[6] the District Court, on April 15, 1975, granted the summary judgment motions while denying plaintiffs' Rule 56(f) discovery motion (Pet. App. 61). It erroneously read the complaints as containing no allegation of combination and only an allegation of interdependent consciously parallel action, and, therefore, held that the complaints failed to state a "cause of action" under Section 1 of the Sherman Act (Pet. App. 61, 68). The District Court thereupon entered final judgment pursuant to Rule 54(b), Fed. R. Civ. P. (Pet. App. 74-75).

In July, 1977, the Court of Appeals vacated the District Court's class action order and reversed its summary

5. Shell Oil Corporation's Motion for Summary Judgment was filed on May 28, 1974.

6. The District Court excluded any consideration of disputed issues of fact and looked only to the allegations in the complaint (Pet. App. 59, 61, 68). The District Court thus treated the summary judgment motions as the equivalent of motions to dismiss under Rule 12(b)(6), Fed. R. Civ. P. The Court of Appeals also treated the summary judgment motions as motions to dismiss (Pet. App. 15-17), and petitioners have not urged any different treatment in their petition.

judgment order (Pet. App. 42).[7] The Court of Appeals first held that the allegation of a combination in plaintiffs' complaint sufficed to state a claim under Section 1 of the Sherman Act because it appeared that there was a set of facts which, if proven, would entitle plaintiffs to relief (Pet. App. 19-21). Citing well-established law, the Court of Appeals simply instructed the District Court that defendants' parallel conduct was circumstantial evidence from which a combination can be inferred in appropriate circumstances (Pet. App. 20). The Court of Appeals also held that plaintiffs' alternative theory of relief, that interdependent conscious parallelism as opposed to conscious parallelism stated a Sherman Act Section 1 claim, could not be adjudicated in the absence of an appropriate factual record (Pet. App. 21-22).

On the class action issue, the Court of Appeals, upon careful review of the decisions of this Court and the other courts of appeal, held that the District Court had erroneously identified purchaser coercion as an independent element of a tying violation where a sale on condition was already established (Pet. App. 26-31, 32-33). The Court of Appeals thereupon examined the other class action rulings of the District Court and concluded that the court had erroneously misidentified as individual issues other issues common to the class (Pet. App. 34-41). It therefore vacated the District Court's class certification order and remanded the cases to that court for it to consider whether or not the common issues, now correctly identified, warranted class action treatment (Pet. App. 35, 39, 42).

7. Defendants had moved to dismiss the appeal on the ground that final judgment had been improperly entered below. Defendants' motions were considered together with the merits, and were denied by the Court of Appeals in its July, 1977 decision (Pet. App. 8-14).

ARGUMENT

I.

The Court of Appeals Correctly Determined the Sufficiency of the Complaints and Did Not Reach Any Decision in Conflict With Those of This Court or the Courts of Appeals

A comparison of the decision of the Court of Appeals with the petition shows that petitioners do not quarrel with the law applied by the Court of Appeals, but only with the result reached. This is not a proper ground for certiorari.

A. The Court of Appeals Used the Proper Criteria to Determine Whether or Not the Complaint Stated a Claim

Petitioners seek certiorari on the ground that the Third Circuit's resolution of the motion to dismiss[8] conflicts with settled principles of law regarding federal practice pursuant to Rules 12(b)(6) and 56, Fed. R. Civ. P. (Pet. at 9, 13). Nothing could be further from the truth. The inflammatory rhetoric of the petition notwithstanding, the Third Circuit simply used the following universally accepted criteria in evaluating the sufficiency of the complaint:

> "The standard by which the orders must be tested is whether taking the allegations of the complaint as true, *Cooper v. Pate*, 378 U. S. 546 (1964), and viewing them liberally giving plaintiffs the benefit of all inferences which fairly may be drawn therefrom, *see Murray v. City of Milford*, 380 F. 2d 468, 470 (2d

8. *See* note 6, *supra*.

> Cir. 1967), 'it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief.' *Hospital Building Co. v. Trustees of Rex College*, 425 U. S. 738, 746 (1976)." (Pet. App. 17).

See *Scheuer v. Rhodes*, 416 U. S. 232, 236 (1974); *Cruz v. Beto*, 405 U. S. 319, 322 (1972), *Jenkins v. McKeithen*, 395 U. S. 411, 422 (1969); *Conley v. Gibson*, 355 U. S. 41, 45-46 (1957), which all hold that an action is not to be dismissed if there is any basis upon which the plaintiff may recover.[9]

The decision of the Court of Appeals is completely consistent with these long-settled principles. Citing case law of this Court to whose application petitioners take no exception here, the Third Circuit first noted that interdependent consciously parallel action, which plaintiffs had alleged as grounds for their claim, is well-accepted circumstantial evidence of combination under certain particular circumstances (Pet. App. 20).[10] Further, noting that plaintiffs were not required "to plead the basis upon which [the] combination will be proven," the Third Circuit held the complaints sufficient because it was possible that plaintiffs could prove the particular circumstances which would make the alleged consciously parallel conduct prima facie evidence of combination (Pet. App. 20). In thus holding the complaints sufficient because there appeared to be a basis on which plaintiffs would be entitled to relief, the court below did no more than follow this Court's instructions in *Conley v. Gibson* and its progeny, *supra* at p. 8.

In claiming that the Third Circuit abrogated summary procedures in complex civil litigation, petitioners focus selectively on the Court of Appeals' refusal to decide the sufficiency of plaintiffs' *alternative* interdependent conscious parallelism theory, calling this refusal the "essential" holding of the decision (Pet. at 10-14; Pet. App. 21-22). Petitioners thus ignore the Court of Appeals' application of settled principles of pleading review in its determination that—regardless of whether interdependent conscious parallelism was itself actionable—the complaint alleged a traditional Sherman Act combination (Pet. App. 17-21). The foundation of petitioners' contentions collapses when one recognizes that the refusal to decide the interdependent conscious parallelism issue, far from being the basis of the Third Circuit's opinion, is only a holding on an alternative contention made after the basic sufficiency of the complaint had been upheld.[11]

Similarly, petitioners' emotional arguments that there will be discovery in a vacuum amounting to "jurisprudential anarchy" (Pet. at 11), also rest entirely on the peti-

9. For cases in the lower courts, see 5 C. Wright & A. Miller, *Federal Practice and Procedure* §§ 1215 at p. 113 n. 67 (collecting cases) & 1357 at pp. 600-605 (collecting cases).

10. The Third Circuit relied on *First National Bank of Ariz. v. Cities Serv. Co.*, 391 U. S. 253, 274-88 (1968) and *Interstate Circuit, Inc. v. United States*, 306 U. S. 208 (1939). *Interstate Circuit* holds that a tacit agreement may be inferred from circumstantial evidence, 306 U. S. at 226-27, while *First National Bank* holds that alleged co-conspirators must have some motive for agreement before a combination can be inferred from parallel conduct. 391 U. S. at 284-88. Accordingly, the Court of Appeals held here, as it had in *Venzie Corp. v. United States Mineral Prods. Co.*, 521 F. 2d 1309, 1314 (1975), that a combination could be inferred from petitioners' admitted parallel conduct (see Pet. App. 78) if plaintiffs can prove independent economic interest contrary to agreement, and a motive to agree on the part of petitioners (Pet. App. 20). Petitioners do not disagree with this holding here.

11. The Court of Appeals' refusal to decide an issue unnecessarily, far from being a repeal of accepted canons of procedure, comports with the universally recognized judicial duty to refrain from making abstract and unnecessary pronouncements of law. Moreover, its refusal to decide a novel question of antitrust policy *in vacuo* is also consistent with accepted judicial practice. *See, e.g., White Motor Co. v. United States*, 372 U. S. 253, 263-64 (1963).

tion's mistaken premise that the theory of respondents' case is *solely* interdependent conscious parallelism. These arguments are belied by the Court of Appeals' holding that plaintiffs would have to prove a combination and by that court's careful delineation of the circumstantial evidence necessary to prove such a combination (Pet. App. 20). The lower court can readily guide discovery within the parameters set out by the Court of Appeals.[12]

Finally, petitioners seek certiorari by arguing that *this* case "demonstrates the need for summary procedures" because six years have elapsed since the complaints were filed (Pet. at 13-14). Quite aside from whether this is grounds for certiorari, petitioners are hardly blameless for the amount of time this litigation has consumed. Three of these six years have been expended on a formalistic battle over the sufficiency of the complaints, even though the complaints were sufficient in the first instance to state a traditional Section 1 combination claim.[13] As the Court of Appeals stated in holding the complaints sufficient to state a claim of combination, "the goals of judicial administration are retarded, not advanced, when the pleadings are used as a battleground for legal skirmishes without the necessary factual development upon which to focus decision." (Pet. App. at 21) (citation omitted).[14] Moreover, the Court of Appeals' refusal to decide the interdependent conscious parallelism issue does not have any general effect on the availability of summary procedures to determine

12. See *Manual For Complex Litigation* ¶ 1.10.

13. Moreover, the same petitioners who now argue that the questions presented warrant "urgent review" in this Court (Pet. at 3) argued below that these questions were not even appealable (Pet. App. 8); see note 7, *supra*. It is at the very least anomalous that defendants now complain of a delay to which they have contributed in this manner.

14. For like observations, see *Rennie & Laughlin, Inc. v. Chrysler Corp.*, 242 F. 2d 208, 213 (9th Cir. 1957).

questions of law. The Third Circuit did not eliminate their availability in complex cases or anywhere else, but only held summary dismissal for failure to state a claim inappropriate in this particular case. Compare *White Motor Co. v. United States*, 372 U. S. 253, 263-64 (1963).

It is apparent that what petitioners seek to have this Court believe is that the universally accepted pleading standards set forth in *Conley v. Gibson* and subsequent cases, *supra* p. 8, are to be compromised because a case is large or complex, or because a significant amount of time has passed since its institution.[15] In effect, what petitioners are clamoring for is the imposition on plaintiffs in such cases of a significantly heavier pleading burden. This is dramatically evidenced by the petitioners' (and the dissent's) claim that the plaintiffs must plead a theory in their complaint (Pet. at 12; Pet. App. 42). Such a proposition is astounding inasmuch as the "theory of the pleadings" doctrine has been thoroughly discredited in federal practice, and was eliminated by the promulgation of the Federal Rules of Civil Procedure in 1938. 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1219 (collecting cases).[16]

15. It should be remembered, however, that the "big case" arises when members of major industries combine to commit large-scale violations of law causing widespread injury, as, for example, in the well-known electrical equipment price-fixing conspiracy of the 1960s.

16. Petitioners, and the District Court as well, similarly make the erroneous assertion that plaintiffs must plead a "cause of action" in the complaint (Pet. at 11; Pet. App. at 61). However, contrary to the numerous assertions in the petition (Pet. at 11, 13, 15), there is no requirement that plaintiffs plead a "cause of action". Federal Rule of Civil Procedure 8(a) requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." (R. App. 2A) (emphasis supplied). This Court's Advisory Committee in 1955 specifically rejected a proposal that Rule 8(a)(2) be modified to require the pleading of a "cause of action". *See* 2A *Moore's Federal Practice* ¶ 8.12, at pp. 1691-92.

The difficulties of the big case are now appreciated by everyone, but they cannot obscure the fact that there are valid policy objectives embodied in the private action provisions of the antitrust laws. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 97 S. Ct. 690, 696 (1977). If improvements are to be secured in the administration of these cases they should come about after extensive study of the operation of the Rules and the development of an overall set of new procedures—not through *ad hoc*, draconian dismissals of individual cases through the imposition of unjustified pleading burdens on individual claimants. Plaintiffs here have a right not to have major surgery performed on the Federal Rules at their expense when a full diagnosis of the big case problem has yet to be made. That, respondents submit, is all that petitioners can be seeking on this application.

B. The Petition Seeks to Present an Abstract Question Not Even Decided by the Court Below

Petitioners also contend that the Court of Appeals held interdependent conscious parallelism to violate Section 1 of the Sherman Act (Pet. at 10, 14-17). Petitioners so argue even though the Court of Appeals declined to decide this issue without any record, and even though that court recognized that a decision on this issue might well be unnecessary (Pet. App. 22).[17]

Again, the explanation for the gap between the petition and the opinion lies in a mischaracterization by petitioners. The petition simply ignores the Court of Appeals' unexceptionable holding that consciously parallel conduct is, in circumstances which respondents seek to prove,[18] admissible circumstantial evidence of combination (Pet. App. 20).

What petitioners are urging, in seeking certiorari on the interdependent conscious parallelism issue, is that respondents are forever wed to this theory since it was pleaded in the complaint (Pet. at 10-11). However, as the Third Circuit implicitly recognized in relying on the more traditional and well-accepted role of conscious parallelism as circumstantial evidence, respondents are *not* irrevocably bound to a theory they pleaded to the exclusion of any other valid theory of liability grounded on the facts alleged. *Janke Constr. Co. v. Vulcan Materials Co.*, 527 F. 2d 772, 776 (7th Cir. 1976); *Thompson v. Allstate Ins. Co.*, 476 F. 2d 746 (5th Cir. 1973) (Wisdom, J.). It is this result, long accepted as a matter of federal civil procedure,[19] with which petitioners quarrel in seeking to confine the theory of this litigation to interdependent con-

17. Indeed plaintiffs have already, without any discovery on the merits, developed evidence of a pattern of agreement among defendants in the form of widespread exchange or "swapping" agreements (Pet. App. 79, n. 6). The existence of this pattern, in which defendants frequently sell their gasoline to each other while refraining from selling to each others' lessee-dealers, is itself direct evidence of action contrary to what would be defendants' independent economic interests absent collusion. It is, therefore, circumstantial evidence of combination under *Venzie Corp., supra* note 10. Furthermore, this pattern of "swapping" is evidence of product fungibility.

Defendants, in effect, seek to shield this evidence from further discovery through their restrictive construction of the complaint. However, the very fact that the relevant evidence in this case is largely in the hands of defendants is part of what made summary dismissal in the District Court incorrect. *Hospital Building Co. v. Trustees of Rex College*, 425 U. S. 738, 746 (1976). Indeed, through discovery of evidence in the hands of defendants, respondents may well obtain *direct* evidence of the combination suggested by defendants' parallel practices.

18. These circumstances are independent economic interest running contrary to agreement, and motive to agree (Pet. App. 20). See note 10 *supra*.

19. 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1219 at p. 145, n. 51 (collecting cases).

scious parallelism.[20] However, certiorari should not be granted merely to review results unfavorable to particular litigants. Rather, certiorari is appropriate to review important or unsettled issues of procedural or substantive law. *E.g., La Buy v. Howes Leather Co.*, 352 U. S. 249, 251 (1957). There is no unsettled law created by the decision below concerning the proper construction of the complaint under *Conley v. Gibson* and *Hospital Building Co., supra* p. 8. There is also no unsettled law concerning the admissibility of parallel conduct as circumstantial evidence of combination. *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U. S. 537, 541 (1954);[21] *American Tobacco Co. v. United States*, 328 U. S. 781,

20. Notably, the dissent, like the petition, disregards the majority's ruling that the complaints alleged a combination which could be proven by circumstantial evidence. The error of the dissent, on which its discussion of conscious parallelism and undefined discovery is based, is its purportedly "favorable," but actually literal, reading of the complaint as alleging only interdependent conscious parallelism (Pet. App. 45). This literal reading directly contradicts the rules of pleading construction adopted by this Court in *Conley v. Gibson et seq.*, as the majority opinion recognized (Pet. App. 17, 19).

Apparently, the dissent would have been satisfied if the complaint had alleged a combination "evidenced" by consciously parallel business behavior instead of a combination "constituted" thereby (see Pet. App. 45). However, the Federal Rules of Civil Procedure are plainly at war with the idea that the mere form of statement in a complaint is controlling. *See, e.g.*, Rule 8(f), Fed. R. Civ. P. (R. App. 3A) (complaints shall be construed to do substantial justice). The 1955 Advisory Committee Report to this Court observed: "• • • [T]he Rules are designed to discourage battles over the mere form of the statement." (reprinted in 12 C. Wright & A. Miller, *Federal Practice and Procedure*, Appendix F, at p. 591).

21. Petitioners correctly cite *Theatre Enterprises* for the proposition that consciously parallel behavior is not *by itself* a Sherman Act violation (Pet. at 15), but disregard the case's explicit recognition of parallel conduct as "admissible circumstantial evidence from which the fact finder may infer agreement." 346 U. S. at 540-41 (citations omitted).

809-10 (1946); *United States v. Masonite Corp.*, 316 U. S. 265, 274-75 (1942); *Interstate Circuit Inc. v. United States*, 306 U. S. 208 (1939); *see also First Nat'l Bank of Ariz. v. Cities Service Co.*, 391 U. S. 253, 284-88 (1968).

Indeed, petitioners are constrained to find conflict in the decisions by focusing on the Third Circuit's holding that interdependent conscious parallelism "*may*" state a Section 1 claim (Pet. at 15) (emphasis supplied). Since the Court of Appeals did not decide this issue, there is no conflict with other decisions. Petitioners' arguments on the insufficiency of interdependent conscious parallelism alone to state a Section 1 claim (Pet. 14-17) actually raise a purely abstract question which this Court, like the appellate court below, would not be required to reach in order to decide the sufficiency of the complaints. *Cf. The Monrosa v. Carbon Black Export, Inc.*, 359 U. S. 180, 183-84 (1959) (certiorari dismissed as improvidently granted where adequate ground for decision below existed); *Oliphant v. Brotherhood of Locomotive Firemen*, 359 U. S. 935 (1959) (certiorari inappropriate in "abstract context").

Finally, the absence of any conflict between the decision below and other authorities renders petitioners' jeremiad on the unavailability of in banc review immaterial. In the absence of intracircuit conflict there is, of course, no need for in banc review merely for disappointed litigants to reargue the same matters. *United States v. Rosciano*, 499 F. 2d 173 (7th Cir. 1974); *cf. United States v. Doe*, 455 F. 2d 753, 762 (1st Cir. 1972), *vacated on other grounds sub nom. Gravel v. United States*, 408 U. S. 606 (1972).

II.

Substantive Antitrust Law Does Not Require a Showing of Explicit Coercion When the Sale of One Product Is Conditioned on Sale of Another.

The Court of Appeals, on the basis of an extended analysis of the case law of antitrust tying violations as developed in this Court and the other courts of appeals, concluded that a separate element of additional buyer "coercion" is not part of a tying violation where a sale on condition has been shown (Pet. App. 28 & 27-31). Rather, the fact that a buyer could not purchase one product unless, as a result of a defendant's economic power over that product, he was contractually obligated to purchase another product, was held sufficient to prove a tying violation under the antitrust laws (Pet. App. 27-31). This conclusion is directly and indeed unequivocally supported by the decisions of this Court and the lower courts, as well as by considerations of antitrust policy.

In *Times-Picayune Publishing Co. v. United States*, 345 U. S. 584 (1953), this Court stated that a showing of illegal conditioning definitionally constituted the requisite showing of coercion, observing:

> "By conditioning his sale of one commodity on the purchase of another, a seller *coerces* the abdication of buyers' independent judgment as to the 'tied' product's merits . . ." 345 U. S. at 605 [emphasis supplied].[22]

22. Petitioners' citation from *Times-Picayune Publishing Co.* is taken out of context (Pet. at 25). In the language quoted by petitioners, the Court was referring only to the requirement that two meaningfully separate products must exist before a tying violation can be found, not to what constitutes a tie.

Similarly, in *Northern Pac. Ry. Co. v. United States*, 356 U. S. 1 (1958), this Court noted the distinguishing indicia of a tying arrangement:

> "A tying arrangement may be *defined* as an agreement by a party to sell one product *on the condition* that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.[4]"

4. Of course where the buyer is free to take either product by itself there is no tying problem even though the seller may also offer the two items as a unit at a single price.

356 U. S. at 5-6 (emphasis supplied; footnote by the Court). *See also Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U. S. 495, 517 (1969) (White, J., dissenting) ("What triggers the application of the antitrust laws is the asserted tying arrangement, the sale of one product conditioned on the purchase of another").

The decision of the Court of Appeals below is similarly in harmony with those of every other circuit that has spoken on the question, as well as with the Third Circuit's own decision in *Ungar v. Dunkin' Donuts, Inc.*, 531 F. 2d 1211 (3d Cir. 1976), *cert. denied*, 429 U. S. 823 (1976). These courts have all held that where a sale on condition is shown no separate showing of coercion is necessary, coercion being implicit in the unavailability of the tying good without the tied good. Only in the absence of contractual conditioning have courts held a separate showing of some other form of coercion to be necessary. In *Ungar* itself, for example, the Third Circuit stated that the existence of a condition in a contract of sale for the tying good was sufficient to prove a tying violation, saying:

> "A formal agreement is not necessary, though it is *sufficient*. But, *in the absence* of a formal agreement, a plaintiff must establish *in some other* way

> that a tie-in was involved and not merely the sale of two products by a single seller." 531 F. 2d at 1224 [emphasis supplied].

Petitioners conspicuously omit reference to this statement in *Ungar* in their apparent haste to create the appearance of conflict in the decisions.

Similarly, the other courts of appeals that have analyzed the issue have uniformly recognized that additional coercion need not be shown in a tying case when a condition is included in a contract of sale for two products. These courts have all held that the condition is itself sufficient to supply the requisite coercion, and that a separate showing of coercion need only be made in the absence of a contractual condition. *See Moore v. Jas. H. Matthews & Co.*, 550 F. 2d 1207, 1216-17 (9th Cir. 1977); *Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F. 2d 1307, 1328 (5th Cir. 1976); *Hill v. A-T-O, Inc.*, 535 F. 2d 1349, 1355 (2d Cir. 1976); *cf. Advance Business Systems & Supply Co. v. SCM Corp.*, 415 F. 2d 55, 64 (4th Cir. 1969), *cert. denied*, 397 U. S. 920 (1970). *See also Aamco Automatic Transmissions, Inc. v. Tayloe*, 407 F. Supp. 430 (E. D. Pa. 1976). Notably, although petitioners argue, inexplicably, that a tying violation changes form and takes on an extra element when a buyer, rather than the government or a competing *seller* of the tied product, seeks to enforce the same law (Pet. at 25), many of the cases rejecting a separate coercion requirement are cases brought by overcharged buyers. *E.g., Response of Carolina, Inc. v. Leasco Response, Inc., supra.*

In all the cases cited by petitioners for the existence of an additional coercion requirement as part of a tying violation, the contract at issue simply involved the purchase of two separate products *without* conditioning sale of one product on sale of the other. In these cases the courts, therefore, required proof of "coerced" purchase of the second product as an alternative means of establishing that purchase of the first was conditioned on purchase of the second. *E.g., Capital Temporaries, Inc. v. Olsten Corp.*, 506 F. 2d 658, 665-66 (2d Cir. 1974);[23] *Response of Carolina, Inc. v. Leasco, Inc.; Ungar v. Dunkin' Donuts, Inc., supra.* In none of these cases did the courts of appeals even in passing define coercion as a separate element of a tying violation additional to the conditioning element. *E.g., Ungar v. Dunkin' Donuts, Inc., supra,* 531 F. 2d at 1224.[24]

Hence, there is no conflict among the circuit court cases on tying, as the Court of Appeals below was itself careful to determine (Pet. App. 28-31). Petitioners have created a specious appearance of such conflict by indiscriminate comparison of cases where contractual conditioning was absent, to cases such as the present case in which contractual conditioning is clearly the issue (Pet. App. 26-31; 32-33).[25]

Since, as the court below recognized, proof of conditioning of the purchase of one product upon another has always sufficed to establish tying, petitioners apparently

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23. Petitioners' extensive citation from *Capital Temporaries* (Pet. at 26-27) is inapposite because, while the court there assumed that the contract "obligated the plaintiff to operate both kinds of franchises," (Pet. at 26), it did *not* assume that the contract required operation of one franchise as a *condition* of operation of another. Indeed, it could not have assumed such a condition in the contract, as there was none. *See* 506 F. 2d at 665, n. 5.

24. *Compare* Clayton Act § 3, 15 U. S. C. § 14 (prohibiting sale on "condition . . .").

25. Petitioners nowhere seriously dispute the Court of Appeals' basic conclusion that a contractual clause can be demonstrated to be a condition in its practical economic effect even though the language of condition is not explicitly used (Pet. App. 32-33). Petitioners' only argument on this point is to belittle this holding (Pet. at 29), and to urge incorrectly that common terms in their leases do not create a common issue. *See* p. 26 *infra.*

would contend that the showing of a sale on condition should suddenly be held insufficient to establish a tying violation, and that an involuntary purchase of the tied product must now be shown as well (Pet. at 25, 28). This contention overlooks the economic purposes of the antitrust laws' prohibition against tying, as well as leading decisions of this Court.

Petitioners confuse voluntary purchase of a product with voluntary payment of its price. Their voluntariness contention fails to recognize that even where one person's purchase of a tied good is, in a subjective sense, "voluntary", antitrust injury will still result from payment of the higher price caused by the reduction in competition in the market for the tied good. *Cf. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 97 S. Ct. 690, 696 (1977) ("antitrust injury . . . is . . . injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful"). The price of the tied good will ordinarily be higher, due to artificially induced demand, so long as there are *any* purchases of it that are involuntary and that would *not* be made in the absence of the tying condition. The "voluntary" purchaser of the tied good, though agreeing to purchase it at the higher price in order to obtain the tying good, is thus denied the lower price that would prevail in the presence of competitor access to the market for the tied good. *Cf. Carpa, Inc. v. Ward Foods, Inc.*, 536 F. 2d 39, 46 (5th Cir. 1976) (essence of tie-in is "burdensome terms" for tied good). One of the fundamental purposes of the antitrust laws' prohibitions against restraints on competition is to give purchasers the lowest possible price levels which free and open competition for sales (here of the tied goods) can foster. *Northern Pac. Ry. Co. v. United States*, 356 U. S. 1, 4 (1959); see F. Scherer, *Industrial Market Structure and Performance* 12-27 (1970).[26]

The very existence of a tying condition has, in effect, been held by this Court to be conclusive evidence of involuntary purchase, for "[i]f the manufacturer's brand of the tied product is in fact superior to that of competitors the buyer will presumably choose it anyway." *Standard Oil Co. v. United States*, 337 U. S. 293, 306 (1949). Hence the petition offers nothing more than an invitation to reiterate the obvious—an invitation not worthy of this Court's time and effort.

In short, in addition to raising a false spectre of intercircuit and intracircuit conflict, petitioners are now asking this Court to add an element to the tying offense under Section 1 of the Sherman Act which neither this Court, nor any court of appeals, has hitherto identified, which all courts of appeal to have considered the question have rejected, and which, finally, is directly contrary to the policy of the antitrust laws. Petitioners' invitation to this Court to make an unnecessary ruling of law, when the decision below was correct, should be declined.

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26. In the instant case an "involuntary" purchase requirement for proof of illegal tying would be especially inappropriate because plaintiffs allege that petitioners' product, gasoline, is a fungible commodity. With fungible goods one supplier's product is, by definition, equivalent to another's and the principal basis for competition among suppliers is the price at which they offer the goods. It defies common sense to contend that under such circumstances a purchaser of gasoline will "voluntarily" buy one supplier's gasoline when another offers a lower price.

In their reply brief in this Court petitioners may dispute respondents' contention that gasoline is a fungible commodity. *Cf.* Pet. at 16-17 (discussing the merits never reached below). Any such effort to develop the merits of this controversy here can only underline the importance of developing a full factual record before plenary review of the purported "coercion" issue is granted in this Court. A ruling on this issue, without a determination of whether gasoline is a fungible commodity, would seem to be premature.

III.

In Reviewing the Class Action Decision of the District Court the Court of Appeals Applied Existing Criteria for Appellate Review of District Court Class Action Determinations

Petitioners also claim that in reviewing the District Court's class action decision, the Court of Appeals did not give proper weight to the exercise of discretion by the District Court. This claim misreads the Third Circuit's opinion, which merely vacated the District Court's decision and remanded the case for further proceedings in the District Court (Pet. App. 42).[27] In holding that the District Court had misidentified the legal issues raised by plaintiffs' complaint (*e.g.*, Pet. App. 32-33), the Court of Appeals carried out the traditional appellate function of overseeing the trial judge's construction and application of the controlling principles of law. Its opinion is actually an admirable effort to guide the District Court in the applicable principles of substantive law which are relevant to the inquiry that must be made under Federal Rule 23(b)(3). Instead of the abuse of appellate power that the petitioners so noisily claim occurred, a fair reading of the opinion below indicates that it is nothing more than the expected guidance offered by an appellate court to the court of first instance (*E.g.*, Pet. App. 36-39).

In correcting the District Court's errors of law without redetermining the class issue, the Court of Appeals applied the standard of review set forth in *Katz v. Carte Blanche Corp.*, 496 F. 2d 747 (3d Cir. 1974) (in banc), *cert. denied*, 419 U. S. 885 (1974) (Pet. App. 25). Petitioners concede—and even argue—that *Katz* sets forth the correct standard for appellate review of a district court's class action determination (Pet. at 18). In *Katz*, the Third Circuit, speaking through the same judge who joined in the opinion below, held as follows:

> "[t]he predominance finding requires at a minimum *the identification of the legal and factual issues, common and diverse, and an identification of the class members to which those relate. We must determine whether the district court has properly identified the factual or legal issues, and has properly identified those which are common.* If the district court has properly identified the issues common and diverse, we would undoubtedly defer in most instances to its conclusion as to predominance, since that requirement relates to the conservation of litigation effort, and the trial court's judgment probably will be as good as ours. If the district court has applied the correct criteria to the facts of the case, then, it is fair to say that we will ordinarily defer to its exercise of discretion. *But if it has not properly identified the issues, and not properly evaluated which are common, the order is not entitled to such deference.*" 496 F. 2d at 756-57 [emphasis supplied].[28]

The holdings of the Court of Appeals in the instant case are no more than corrections of District Court errors of law or misidentification of common issues, or in one instance of failure to consider the applicable criteria of Rule 23.

27. Petitioners' assertion that the Court of Appeals made a "de novo class determination" (Pet. at 19) is inaccurate and is flatly contradicted by the Court of Appeals' remand of this litigation for further consideration of the class action issue (Pet. App. at 42).

28. Petitioners' paraphrase of *Katz* omits the last sentence (Pet. at 19). The quotation from *Katz* in the dissent is similarly selective, even though the dissenting opinion claims otherwise (Pet. App. 49).

For example, in holding that the District Court had erroneously assumed that an additional showing of coercion was an element of a tying violation where a sale on condition was present, the Court of Appeals did no more than hold that the District Court had misidentified the legal elements of a tying violation (Pet. App. 27-31; 32-33). Similarly, in determining that the existence of a *de facto* condition in petitioners' short-term leases was a common question on which respondents could introduce class-wide proof with respect to the lease claim, the Court of Appeals merely "identified [one of] those issues which are common to the class members." (Pet. at 18, paraphrasing *Katz*). This identification of common issues by the Court of Appeals did not at all abridge the District Court's discretion to decide whether these issues, once correctly understood as questions common to all class members' claims, would predominate over individual ones that petitioners might still raise in the District Court on remand (Pet. App. 39). Indeed, the District Court, far from granting a class, has now ordered full briefing of the class action certification issue (R. App. 4A-5A).

Another illustration of the Court of Appeals' measured review of the District Court's class certification decision is the appellate court's treatment of respondents' trademark tying claim. In vacating the District Court's class certification decision, the Court of Appeals did not order the District Court to grant a class on this claim. Rather, it noted that the District Court had failed even to *consider* the relevant legal criterion under Rule 23, *viz.*, Rule 23 (c)(4)(A)'s provision for the maintenance of class actions only as to particular issues (Pet. App. 35). The Court of Appeals simply remanded to the District Court for consideration of separate certification of this claim under Rule 23(c)(4)(A), Fed. R. Civ. P. This is such a perfect example of the Court of Appeals' observance of the *Katz*

standard of appellate review that petitioners are constrained to ignore it altogether in their petition to this Court.

The approach adopted by the Court of Appeals does not conflict with that of other circuits. Petitioners concede that the "principles [of *Katz*] have been adopted by several other circuits." (Pet. at 18) (citations omitted). Therefore, no conflict justifying granting the writ has been shown.[29]

Petitioners' reliance on the Fourth Circuit's decision in *Windham v. American Brands, Inc.*, 1977-2 Trade Cas. ¶61,670 (4th Cir. 1977) (in banc), as raising a conflict actually demonstrates the inappropriateness of certiorari in this instance (Pet. at 23-24). A comparison of the opinions in *Windham* and this case shows quite clearly the case-specific character of the commonality question in antitrust actions, since that case involved three different yet intertwined conspiracy claims, 1977-2 Trade Cas. at pp. 72,746-47, whereas this case involves only one basic claim of combination to restrain trade (via the class-wide tying arrangements). Moreover, in terms of suggesting the process to be followed by the district courts, *Windham* and *Bogosian* are entirely consistent. Whereas the *in banc* court in *Windham* reversed the Fourth Circuit panel for invading the lower court's discretion by *ordering* it to certify a class action, here the Court of Appeals merely *vacated* the incorrect decision of the lower court, and remanded for that court to exercise its own discretion as to manageability and predominance (Pet. App. 39, 42). Furthermore, *Windham* involved an initial improper appellate court redetermination of manageability, an issue uniquely

29. As just discussed, the review given by the Third Circuit to the class action decision of the District Court is entirely in accordance with the principles of *Katz*. It is the selectiveness of petitioners' quotation from *Katz*, see p. 23 *supra*, that allows the claim of a conflict between *Katz* and the Third Circuit's decision here.

appropriate for district court discretion. *See Katz v. Carte Blanche Corp., supra.* In *Bogosian*, the Third Circuit has explicitly left the issue of predominance, and therefore of manageability, *see* Fed. R. Civ. P. 23(b)(3)(D), open for determination by the District Court (Pet. App. 39, 40).

In disputing the standard of review, petitioners also take issue with the Court of Appeals' identification of the common issues raised by the complaint (Pet. 19-22). As to each of these issues, however, the Court of Appeals was correct in concluding that the issues raised by respondents' tying claims could be treated on a common basis.

First, the Court of Appeals correctly concluded that the existence of over four hundred lease forms did not create individual issues (Pet. App. 34). Petitioners make a general assertion that "many of the provisions are not common to the leases utilized by the defendants" (Pet. at 20). However, it suffices for commonality that the *particular* clauses in question, *e.g.*, the short lease term provision, the leasehold alteration prohibition, and the minimum gasoline purchase provision, be common to the lease forms, and the petition does not challenge this. In effect, the Court of Appeals merely recognized the obvious: that the District Court had erroneously equated the number of linguistic variations in the lease forms with the number of meaningfully different terms therein, and had, therefore, failed to identify the common issues arising from the forms.

Second, the Court of Appeals correctly concluded that the practical economic effect of a short-term lease was a class-wide question. Petitioners assert that "the location of [a] station and its sales volume . . . have a direct impact on the 'practical economic effect' of lease provisions on the individual dealers." (Pet. at 20). However, they ignore the fact that regardless of a lessee-dealer's location or sales volume, their unbridled rights not to renew leases at the end of a year, and to cancel leases immediately

for alteration of the leasehold, will have precisely the same impact on *any* dealers' willingness to sell another supplier's gasoline (which would require leasehold alteration, *inter alia*, Pet. App. 32).

Third, the Court of Appeals correctly held that the existence of market power over the alleged tying good, improved service station sites, presented a common issue on which plaintiffs could seek to introduce common proof. (Pet. App. 35-36). Petitioners, contending that their market power over improved service station sites is not a common question, actually take issue only with an *example* given by the Third Circuit of how plaintiffs might succeed in showing such market power (Pet. at 20-21). However, plaintiffs have alleged and offered to show that such market power does exist on a classwide basis, and defendants are simply trying to have the issue prejudged here by what amounts to advance speculation that plaintiffs will not succeed in making the requisite proof.[30]

Fourth, petitioners contend that the issue of fact of damage does not present a common question. (Pet. at 21-22). However, the Court of Appeals did not *conclude* that fact of damage was a common question, but simply remanded this issue for the District Court to consider afresh, because "neither the parties nor the district court focused on the issues which would determine whether fact of damage may be proven on a class basis." (Pet. App. 39). Rather than assert that this limited holding invades the District Court's discretion, the petition switches focus

30. Notably, the courts can virtually take judicial notice of the pervasiveness of the market power which petitioners wield in the marketing of gasoline. *E.g., Shell Oil Co. v. Federal Trade Commission*, 360 F. 2d 470, 481 (5th Cir. 1966) (Wisdom, J.), *cert. denied*, 385 U. S. 1002 (1967). The Court of Appeals below, however, refrained from such a ruling of law and merely held that plaintiffs—on whom the burden would still fall to demonstrate market power—could attempt to make such proof on a classwide basis.

to a number of alleged errors in the Court of Appeals' damage formulation which, even if they were errors, have not been held to upset class treatment in the past. *See, e.g., Siegel v. Chicken Delight, Inc.*, 448 F. 2d 43, 52-53 (9th Cir. 1971), *cert. denied*, 405 U. S. 955 (1972). Moreover, these alleged errors in the Court's damage formulation form no part of the question presented for review by petitioners, and cannot even be said to be a subsidiary part thereof.

Petitioners also assert that the Court of Appeals "summarily" disregarded the District Court's superiority analysis (Pet. at 22). However, it is clear that the Court of Appeals examined each reason advanced by the District Court for not finding class treatment superior (Pet. App. 40). Moreover, the District Court's superiority findings must in any event be made anew in light of its misidentification of the elements of a tying violation as including proof of individual coercion. On remand, the District Court may, for example, find a class action more manageable without an individual coercion question being presented as to each class member.[31]

In sum, review in this Court of the class action decision of the District Court would be totally inappropriate. No general proposition of federal practice or procedure is at stake, nor are any conflicts between the circuits framed for review. Issues regarding the existence of common questions under Rule 23(b)(3) are by their very nature dependent entirely on the substantive underpinnings of the particular case before the district court, as the Court of

31. In addition, the Court of Appeals can hardly be said to have invaded any exercise of discretion by the District Court to determine the superiority of a class action when the District Court merely recited the factors enumerated under Rule 23(b)(3) *without any factual showing whatever* that they actually applied in this litigation (Pet. App. 101). *Cf. Kessler v. Hynes & Howes Real Estate, Inc.*, 66 F. R. D. 43, 51 (S. D. Iowa 1975).

Appeals below recognized (Pet. App. 38-39). That is, questions of commonality are *ad hoc*, and the basic issue is whether the district judge employed the appropriate law in identifying these questions, which is all that the Third Circuit explored in this case (Pet. App. 24-42; see *Katz v. Carte Blanche Corp., supra.*)

At best petitioners, through their constant reference to the lack of an in banc hearing which they assume would have been granted, are asking this Court to act as a surrogate for the full Third Circuit Court of Appeals when there was no occasion for in banc review below. Since all other bases for Supreme Court review are absent in this case, respondents submit that this would be an unnecessary use of certiorari jurisdiction.

CONCLUSION

For the foregoing reasons the petition for certiorari should be denied.

Respectfully submitted,

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December 23, 1977.

RESPONDENTS' APPENDIX

Federal Rule of Civil Procedure Rule 8

GENERAL RULES OF PLEADING

(a) *Claims for Relief.* A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) *Defenses; Form of Denials.* A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does

so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) *Affirmative Defenses.* In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) *Effect of Failure to Deny.* Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) *Pleading to be Concise and Direct; Consistency.*

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the in-

sufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

(f) *Construction of Pleadings.* All pleadings shall be so construed as to do substantial justice.

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-1137

PAUL J. BOGOSIAN

v.

GULF OIL CORP., et al.

Civil Action No. 71-2543

LOUIS J. PARISI

v.

GULF OIL CORP., et al.

ORDER

AND Now, this 12th day of December, 1977, it is ORDERED as follows:

1. In the event the United States Supreme Court has not acted upon defendants' petition for a writ of certiorari to the Court of Appeals for the Third Circuit in *Bogosian v. Gulf Oil Corp.*, 561 F. 2d 434 (3d Cir. 1977), by March 1, 1978, plaintiffs are directed to file with the court on or before March 15, 1978, any briefs or other legal memoranda addressing the issues of class certification and class definition.

Defendants response to plaintiffs' briefs shall be filed with the court within forty-five (45) days after plaintiff's briefs are filed. Either side may file affidavits, exhibits or other legal papers in support of their briefs.

2. In the event the United States Supreme Court denies the petition for writ of certiorari as described above prior to March 3, 1978, plaintiffs shall file any briefs on the class action issues within two weeks after notification of such denial and defendants' responsive briefs shall be filed within forty-five (45) days after plaintiffs' are filed.

3. In the event the United States Supreme Court grants the petition for a writ of certiorari as described above, counsel shall communicate this fact to the court. The court will at that time determine what further proceedings, if any, shall be conducted in the district court.

By THE COURT:

/s/ DONALD W. VANARTSDALEN

J.